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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

LIEUT. WILLIAM DOWNEY, U. S. A., ET AL.,
Petitioners,

vs.

THE HON. DWIGHT H. GREEN, EX OFFICIO IN THE
CAPACITY HEREINAFTER DESIGNATED,
Respondent.

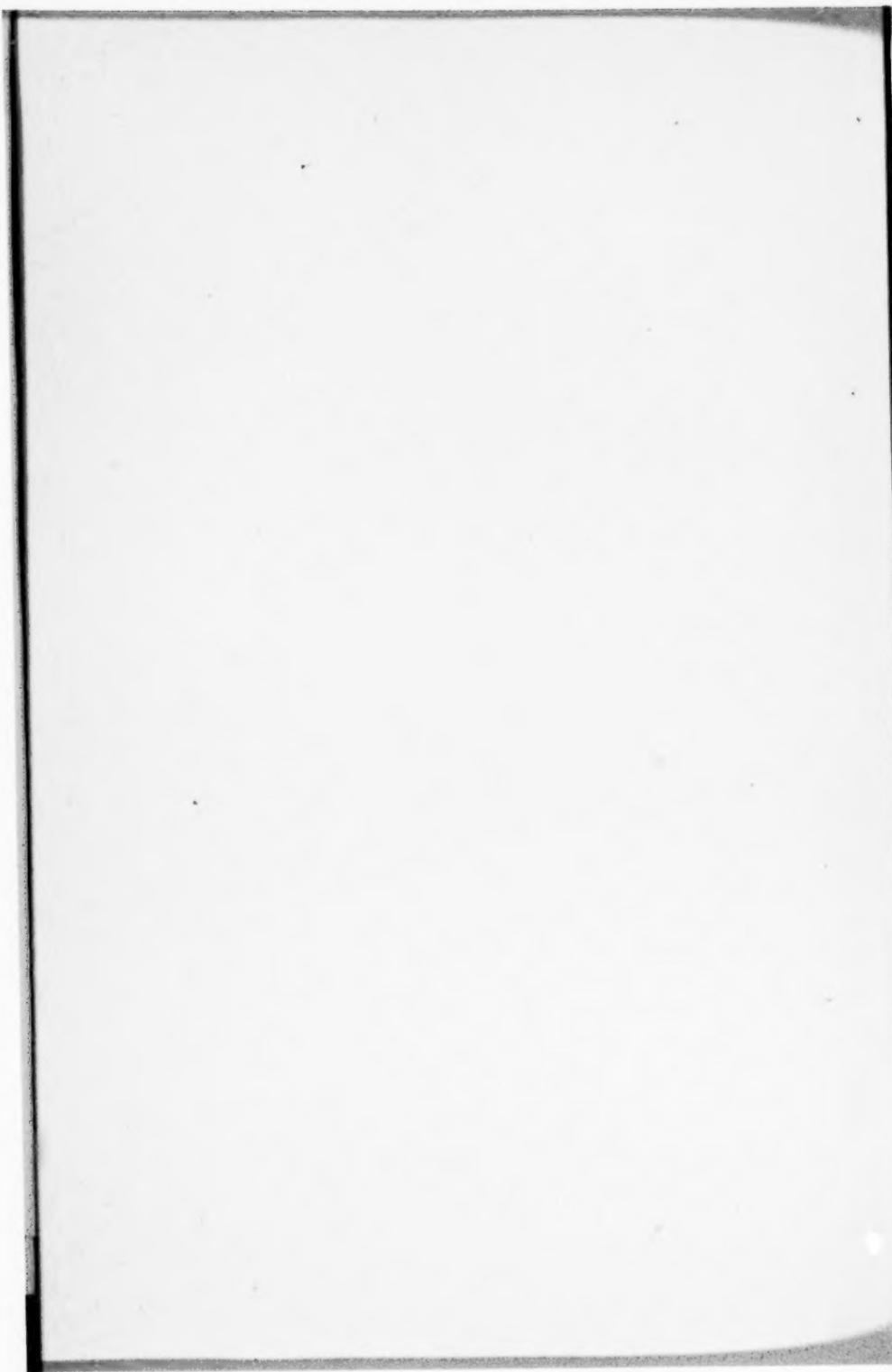
PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR CERTIORARI.

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Come now the Petitioners, Lieut. William Downey, U. S. A., Sgt. Walter Cahill, U. S. A., and Sea. Richard Cahill, U. S. N. (original Plaintiffs below), by Urban A. Lavery, their attorney, and also Sgt. Erwin Kondrat, U. S. A., and Pvt. Walter A. Deans, U. S. A. (Intervening Plaintiffs below), by Francis Heisler, their attorney, each of the said Petitioners being a member of the Armed Forces of the United States, and in that behalf the Petitioners respectfully pray that a Writ of Certiorari be issued by this Court to review the judgment below of the United States Circuit Court of Appeals for the Seventh Circuit, finally entered on August 15, 1944, affirming, without opinion, a certain judgment of the District Court of the United States for the Northern District of Illinois, entered on July 26, 1944.

Judgments Below.

By its judgment last mentioned, the District Court had sustained a "Motion to Dismiss" this alleged cause of action for lack of jurisdiction over both the defendant and the subject matter of the Complaint, and had dismissed the case (R. 46).

The judgment of the Circuit Court of Appeals was accompanied by a "*Per Curiam*" memorandum (R. 68) which concluded with the statement: "The judgment [of the District Court] is affirmed without opinion."

Emergency Hearings by Lower Courts.

The Record shows that the District Court at the request of counsel on both sides, advanced the cause for emergency hearing, in vacation time, and heard and disposed of the case on July 25, 1944, within a few days after it had been put at issue (R. 44). The Record also shows that an appeal was promptly taken and perfected, and that the Circuit Court of Appeals (upon the Motion of Appellants to advance the cause, and upon the request and consent of counsel on both sides) likewise took the cause for emergency hearing and disposition in vacation time. Oral argument was heard by the Court of Appeals on August 10, 1944, and the cause was finally decided by that Court on August 15, 1944. (R. 66.)

Thus, through the consideration and expedition of both the District Court and the Court of Appeals, this cause, which was put at issue in the trial court on July 17, 1944, was finally disposed of on review, in the Circuit Court of Appeals, within one month thereafter.

The facts just recited clearly indicate that the District, and the Circuit Court of Appeals, both were in agreement

that the cause involves a legal controversy of large public interest which deserves emergency and expeditious hearing by the Courts.

Jurisdiction.

Jurisdiction of the Supreme Court is claimed on the ground that the judgments of the District Court and the Circuit Court of Appeals construed and interpreted certain Acts of Congress, and the Constitution of the United States, in such a way as to deprive the Petitioners (and more than 300,000 other Service men in the State of Illinois, similarly situated), of their civil rights, and particularly the right to vote in the Federal Election, of November 7, 1944, contrary to the statutes and Constitution of the United States.

Specifically, the jurisdiction of this Court is invoked under Sections 237b and 240a of the Judicial Code as amended, and under Rule 38 of this Court.

Venue.

The plaintiffs below, as already indicated, are citizens of the State of Illinois, residing in the Northern Judicial District of Illinois. The defendant also is a citizen of the State of Illinois and a resident of the same judicial district. The right of the plaintiffs to bring this suit in that district and to sue the defendant in that district (that is, the question of venue) is claimed under the Civil Rights provision of the Judicial Code of the United States already mentioned. No question of venue has been raised in the case or is here involved.

A Class Suit.

This action is brought as a class suit on behalf of the plaintiffs and on behalf of more than 300,000 other Service men and women from the State of Illinois (as it

is charged) who are similarly situated to the plaintiffs and who constitute a group too numerous to make it practicable to bring them all before the Court; thereby authorizing a class suit on their behalf, in accordance with the Federal Rules of Civil Procedure concerning such suits. (Rule 23, U. S. C. A., Title 28, following Sec. 723(c).)

Summary Statement of Matters Involved.

The Petitioners here are five Servicemen in the Armed Forces of the United States who are citizens and residents of the State of Illinois, duly qualified to vote in the coming Federal Elections, in November 1944. The Complaint, which was filed June 24, 1944, seeks *declaratory relief only*, under the Federal Declaratory Judgment Act. (Section 274 of the Judicial Code; U. S. C. A., Title 28, Sec. 400.)

The Plaintiffs merely sought a "*declaration of their rights*," under the Federal Wartime Voting Act of 1944, (Public Law 277, Chapter 150, Laws, 78 Congress, 2nd Session; U. S. C. A., Title 50, Sections 301, *et seq.*) from the Federal Courts, against the defendant, who, as Governor of a State, was delegated by a Federal Statute, with certain discretion and power of decision as to the use and application, in his State, of the so-called "Federal Ballot." *No State Statute* whatever is involved in the case.

As to the relief asked, it is essential to remember that *no coercive relief whatever* is sought in this case. Although the Complaint does not say so in affirmative fashion, it is clearly drawn on the theory that the defendant, as a responsible public official, will obey and respect the judicial interpretation of the Act of Congress in question, when that Act has been construed by the Courts. It is clearly the theory of the Complaint, therefore, that there can be no impinging by the Courts on the defendant's prerogatives; and there can be no question of "States Rights" involved in the case.

In a jurisdictional sense, the plaintiffs below sued under the so-called Civil Rights Act of the United States, and particularly Section 24 of the Judicial Code (U. S. C. A., Title 28, Sec. 41), which vests the Federal Courts with jurisdiction,—

“ * * * to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage of any State of any right, privilege, or immunity secured by the Constitution of the United States,” etc.

Facts Admitted.

The cause was disposed of in both the lower Courts upon the Pleadings, that is on the Complaint and on a Motion to Dismiss. Therefore all the facts which are well-pleaded in the verified Complaint are admitted. Accordingly this “Summary Statement” becomes an abbreviated recital of the charges of the Complaint and for that reason frequent references to the Complaint will be necessary.

The Complaint in substance charges that the right of the plaintiffs to vote for Federal Officers at the Presidential and Congressional elections in Illinois to be held on November 7, 1944, has been and will continue to be arbitrarily and totally denied to them, *so far as the Federal Wartime Voting Act of 1944 is concerned*, by the acts or omissions of the defendant, who was and is Governer of the State of Illinois.

Major Theories of Plaintiffs' Complaint.

The complaint below was and is based on two major ideas or legal theories:

First: That the Congress of the United States, acting under its War Powers and under its power and authority over Federal elections (as authorized by two provisions hereafter cited of the Federal Constitution) enacted and put into effect the so-called Federal Wartime Voting Act of 1944. By that Act Congress created

a new and special and particular method of voting, *for Federal Elective Officers, in time of war*, for all members of the armed forces of the United States, who come within the purview of that Act. Specifically it is a franchise to vote, directly under Federal laws, and Federal authorities, for:

A. Electors for President and Vice President
of the United States, and

B. Senators and Representatives in Congress.

That under the intent and purpose of Congress, that Act was designed and intended to meet the extraordinary situation created by the unprecedented fact that more than 10 million citizens and voters of the United States were in the armed forces and far removed from their usual places of residence, and therefore unable to vote in the usual and ordinary way; and that the Act, by its title, shows that it was solely an emergency measure designed "to facilitate voting in time of war, by members of the land or naval forces", etc.

Second: That the Federal Declaratory Judgment Act, upon which the Complaint relies for relief, is peculiarly fitted and suited for determining and fixing the rights of these Servicemen to vote under the Federal Wartime Voting Act of 1944, not only in the State of Illinois, but elsewhere throughout the United States.

Because of the sudden and heretofore untried application of this novel method of voting in time of War, grave uncertainties and much confusion has arisen as to the powers and authority and discretion which the said Act has placed upon the Governors of the various States of the Union, and particularly upon the defendant as Governor of the State of Illinois. The Complaint charges (and on argument below it was admitted) that the defendant has publicly announced that as such Governor he has taken an arbitrary and prohibitive attitude and position with respect to the application of the said Act in the State of Illinois; with the result that each of the plaintiffs (as well as more than 300,000 other servicemen and women from the State of Illinois, in the armed forces of the United

States), will, in actual fact, be disfranchised and prevented from voting for all Federal elective officers (so far as the Federal Wartime Voting Act of 1944 is concerned) at the coming Presidential and Congressional elections.

The Brief in support of this petition shows clearly that the Declaratory Judgment Process is well designed and aptly suited for construing and interpreting the rights of voters under election statutes, *in advance for election*; and that it has often been used for that purpose by the courts of many States.

Summary of the Complaint.

Because of the novel nature of the Complaint below, and because of the large public interest in the controversy which it sets forth, we are giving a rather full summary of the pertinent allegations of the Complaint in an Appendix to this Petition. As already stated, *the facts charged in the Complaint*, are admitted. We believe this Court will be better able to get a full and fair understanding of the suit below, and do it easier, from a reading of that Appendix, than if the Court has to read parts or all of the Complaint in the Transcript. Our purpose in this behalf is solely to help the Court.

Main Points of Defense.

The defendant's Motion to Dismiss was based on four principal theories and contentions:

A. That the defendant, since he is Governor of the State of Illinois, cannot be brought to bar of the Federal Courts for any purpose whatever; it is boldly claimed that he is immune to suit in this action.

B. That the suit is somehow "a suit against the State of Illinois," and the action is therefore prohibited by the 11th Amendment.

C. That the State and local election officials in

Illinois are necessary parties defendant, if this action is to be properly heard.

D. That Complaint does not state a cause of action (that is a "controversy") which entitles the Plaintiffs to any relief under the Federal Declaratory Judgment Act.

Prayer for Relief.

The particular attention of this Court is called to the Prayer for Relief sought by these Petitioners. (R. 24-27.) No mandatory or injunctive relief of any kind, against the defendant or any other State Official is either asked or desired. The District Court was asked merely for such *declaratory relief* as would—

"* * * settle and determine the rights and other legal relations of the plaintiffs," (and the other servicemen similarly situated).

That is all that this Court could properly consider (or would be asked to grant) if this Petition should be granted. But that relief *by way merely of interpretation and construction of this much controverted Act of Congress*, would completely satisfy these Petitioners, and the hundreds of thousands of servicemen from Illinois and other states who are in the same situation with them.

Such relief, by way of an Opinion by this Court, would end once and for all the feeling of discrimination which now exists throughout the entire country; due to the fact that in the same military camp or post, and in the same naval station, or on the same boat, all over the world, men from Illinois will be totally denied (by the War Department and the Navy Department) the right to vote the Federal Ballot, even in the restricted way the Act of Congress authorizes that ballot to be used, whereas men from Indiana and Michigan, and Pennsylvania, and numerous other states will be permitted to use and to vote that ballot, if they so wish. That discrimination, it is implicitly charged in the

Complaint (R. 22) does violence to the Constitution of the United States, as between the citizens of one state and the citizens of other states.

Questions Presented.

The Record here presents the following questions:

1. Is the so-called Federal Ballot, created by the Federal Wartime Voting Act of 1944, "unconstitutional and invalid" in Illinois, as the defendant asserts; or is it a proper and valid method of voting by members of the armed forces so far as authorized by the provisions of that Act of Congress?
2. Is the right to vote under the Act last mentioned dominant over and superior to any conflicting provisions or rules or regulations of Illinois law; or may the defendant be heard to say to the contrary that provisions of Illinois law prevail over that Act of Congress, even as to voting for elective Federal officers?
3. Does the right to vote for Federal elective officers, in time of war, under the Act of Congress last mentioned, depend in any way upon, or grow out of the laws of the State of Illinois?
4. Does the defendant, either as Governor of the State of Illinois, or in any other capacity, have any legal right or authority to decide that the right of members of the armed forces of the United States to vote under the Act of Congress last mentioned is "not in accordance with the laws" of Illinois?
5. Is the defendant, under the allegations of the Complaint in this case, entitled to claim that he is immune from suit in the Federal courts in any action brought by these Petitioners for the general purpose set forth in the Complaint below; or must the defendant not answer at the bar of the Federal courts, even though he be the Governor of the State of Illinois?

Reasons Relied On for Allowance of Writ.

The reasons for the allowance of the writ in this case, we respectfully say, stand out in clear fashion from the Summary Statement given above, and from the matters set forth in the **APPENDIX** at the foot of this Petition.

Over and above that point we say that the "reasons" for the judgment of the District Court and for the affirming judgment of the Court of Appeals have never been stated. We believe that the Petitioners here have the constitutional right to have their claims in this case passed upon in the usual way consistent with American Jurisprudence—that is by a supporting judicial opinion which will state for them their *rights or non-rights*.

Wherefore the Petitioners respectfully pray that this Court grant this Petition for Certiorari for the primary reason that (in the language of Rule 38 of this Court) "*a Circuit Court of Appeals has decided an important question of Federal law, which has not been, but should be, settled by this Court.*"

Respectfully submitted,

URBAN A. LAVERY and

FRANCIS HEISLER,

Attorneys for Petitioners.

